Supreme Court, U.S.
FILED
MAR 14 1991
OFFICE OF THE CLERK

(3)

No. 90-1245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ANNE ELISABETH KOLLER,

Petitioner,

v.

RICHARDSON-MERRELL, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

KENNETH J. CHESEBRO
1600 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 661-4423

March 14, 1991

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

1. The importance of the issues presented . . . 1

2. Merrell's futile attempt to obscure the central reliance of the holding below on Fed. R. Evid. 703, and to evade the statutory and constitutional issues thus presented 4

3. Merrell's irrelevant and unfounded argument that a circuit court consensus exists that no reasonable jury may find that Bendectin causes birth defects. 7

CONCLUSION 10

TABLE OF AUTHORITIES

Cases:

Brock v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, *modified*, 884 F.2d 166, *reh'g denied en banc*, 884 F.2d 167 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990) 2, 7, 9, 10

DeLuca v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990) 2, 7

Ealy v. *Richardson-Merrell, Inc.*, 897 F.2d 1159 (D.C. Cir.), *cert. denied*, 111 S.Ct. 370 (1990) *passim*

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) . . 6, 8

Hickman v. *Taylor*, 329 U.S. 495 (1947) 8

I.N.S. v. *Chadha*, 462 U.S. 919 (1983) 8

In re Bendectin Products Litigation, 732 F. Supp. 744 (E.D. Mich. 1990) 10

TABLE OF AUTHORITIES (cont.)

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3rd Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) . . . . . *passim*

In re Paoli Railroad Yard PCB Litigation, 706 F. Supp. 358 (E.D. Pa. 1988), *rev'd*, 916 F.2d 829 (3d Cir. 1990) 3

Longmore v. *Merrell Dow Pharmaceuticals, Inc.*, 737 F. Supp. 1117 (D. Idaho 1990) 7, 10

Lynch v. *Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987) 10

Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 471 U.S. 1002 (1985) 4

Richardson v. *Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989) 3

United States v. *Carver*, 260 U.S. 482 (1923) . . 6

Wilson v. *Merrell Dow Pharmaceuticals, Inc.*, No. 83-C-710-E (N.D. Okla. March 1, 1990) (slip op.) . 10

***Statutes, Rules & Miscellaneous*:**

Federal Rule of Civil Procedure 56 . . . . . *passim*

Federal Rule of Evidence 703 . . . . . *passim*

Petition for Certiorari in *General Electric Co.* v. *Knight*, No. 90-1309 (filed Feb. 20, 1991) 2, 3, 7

Petition for Certiorari in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, No. 83-2004 (filed June 7, 1984) 4

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Nothing in the dense smokescreen of misdirection laid down by Merrell's Opposition can obscure the need for this Court to grant certiorari to address statutory and constitutional issues that are vital to much federal litigation, particularly "mass tort" litigation. The construction of the Federal Rules of Evidence relied on by the Court of Appeals below is nowhere defended by Merrell. As the Petition laid out without rebuttal, the Third Circuit has specifically rejected the legal theories of the Court of Appeals below, *on all three Questions Presented*, in its recent decision in *DeLuca* v. *Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 949-54 (3d Cir. 1990). *See* Pet. 17-18, 23-24, 30. The case for certiorari is overwhelming.

1. The importance of the issues presented.

Merrell suggests that review of the D.C. Circuit's interpretation of Rule 703 "would affect very few cases" and that "no significant difference of any kind exists among the circuit courts as to the role of federal courts in determining the admissibility of expert testimony." Opp. 17. This sweeping statement is not supported and is plainly incorrect.

The Petition, at 22-25, explains in detail that several circuits adhere squarely to the plain language and purpose of Rule 703. They hold that Rule 703 is satisfied as long as the type of information used by an expert witness is customarily relied upon by experts to reach conclusions in that field, and that the *weight* of the ultimate conclusions is irrelevant. In doing so they follow the Third Circuit's landmark opinion in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Other circuits, including the D.C. Circuit below, have

seized on Rule 703 as a tool to permit judges to displace the work of juries in weighing the relative credibility and persuasiveness of expert opinion testimony.

Merrell's somewhat curious response is that all of the cases cited by the Petition agree "that the question of the admissibility of an expert's testimony is a question of law to be decided by the trial court based on the application and interplay of the several pertinent rules of evidence." Opp. 18. But the Petition does not challenge this underlying framework. The Questions Presented arise *within* this framework and address whether the decision below rests on the correct construction of the Federal Rules of Evidence and, if so, whether that construction is constitutional. Merrell's recitation of the "agreement among the circuit courts" over *the framework itself*, Opp. 17-19, is thus irrelevant. The conflict over the core meaning of Rule 703 — a provision enacted by Congress to be uniform throughout the nation — is sharp and significant.

Merrell nowhere denies that this case lies at the center of a fierce battle currently being waged in the lower federal courts over whether it is statutorily and constitutionally permissible for federal judges to employ Congress's Federal Rules of Evidence to screen out expert testimony that may appear to them to have little weight, particularly in "mass tort" cases. Pet. 3-5, 27-30. Shortly after the Petition was filed, the importance of this battle — as well as the extent of the circuit conflict specifically over Rule 703 — was further illustrated in a petition for certiorari filed by a phalanx of defendants in a "mass tort" case involving harms from chemicals knowns as "PCBs". The petition in *General Electric Co.* v. *Knight*, No. 90-1309 (filed Feb. 20, 1991), focuses "on what Judge Patrick E. Higginbotham just a year ago called 'one of the more vexing problems currently facing the federal courts — the role of experts.'" *Id.* at 9 (quoting *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167, 168 (5th Cir. 1989) (dissent from denial of rehearing *en banc*), *cert. denied*, 110 S. Ct. 1511 (1990)).

That petition attempts to vindicate a district judge who held causation evidence inadmissible under Rule 703 based on his view of the *weight* of contrary opinions. The judge expressly relied upon decisions at issue here, including the D.C. Circuit's holding in *Richardson* v. *Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), *cert. denied*, 110 S. Ct. 218 (1989). Faithfully adhering to its view of the plain meaning of Rule 703 — that it is not a tool for judicial "screening" of expert testimony — the Third Circuit reversed.[1] The petition faults the Third Circuit for not "set[ting] some modest limits to the power of a party to put before a jury assertions about causation" and notes that today "other Circuits are urging tighter judicial control of opinion testimony." *General Electric* Pet. 9, 11. The petition observes that "'expert' opinions now have taken center stage in much litigation in the federal courts," *id.* at 12-13, and urges that the conflict concerning the meaning of Rule 703 and related Rules merits review by this Court. *Id.* at 14-18.

Regardless of whether that petition warrants certiorari, it illustrates the importance of Rule 703 in federal litigation, and particularly the continuing dispute over the application of evidence rules in "mass tort" cases. This Court declined to review the Third Circuit's 1983 construction of Rule 703 in the *Japanese*

[1] The district judge, "relying on the reasoning of . . . *Richardson* . . . [found] that the expert opinions based on animal studies are inadmissible," given the defendants' "very convincing evidence on the record that says these studies are irrelevant." *In re Paoli Railroad Yard PCB Litigation*, 706 F. Supp. 358, 368 (E.D. Pa. 1988), *rev'd*, 916 F.2d 829 (3d Cir. 1990). Despite testimony that such studies are routinely relied on in the relevant fields in assessing whether PCBs cause health disorders — regardless of the ultimate opinion — the district judge ventured that "[i]f Rule 703 is to be any limit on the ability of expert witnesses to give their opinions, a court must be permitted to examine the bases of the proffered opinions" and "look behind the experts' statements." *Ibid.* The Third Circuit reversed on the strength of its *Japanese Electronics* decision, reiterating that this mode of analysis is not permitted under Rule 703. 916 F.2d at 853-54.

Electronics case, although it reviewed the other issues presented.[2] Since then, however, a number of circuits have refused to follow *Japanese Electronics* without even acknowledging its analysis of the plain meaning of Rule 703. Instead, these circuits are undermining Congress's basic policy choice to curb federal judicial control over expert testimony and to vest in *juries* the task of resolving the credibility and weight of expert testimony. Pet. 18-22.

It is time for this Court to side with the Third Circuit and reject the extraordinary judicial activism reflected in the policy-based use of Rule 703 by the Court of Appeals below, and other circuits, to exclude expert testimony on a judge's view of the weight of the testimony. It is also time to remind the lower federal courts that Congress has ended the free-wheeling days of common-law evidence rulemaking and that the statutory Rules must be applied as written. Pet. 18, 26-27. The lower federal courts should also be instructed that the Constitution bars judges from using *ad hoc* evidence shortcuts in an attempt to minimize the burden of "mass tort" litigation. Pet. 27-30.

2. Merrell's futile attempt to obscure the central reliance of the holding below on Fed. R. Evid. 703, and to evade the statutory and constitutional issues thus presented.

Merrell's principal argument against a grant of certiorari is that none of the questions is properly presented because the Petition supposedly ignores "the procedural posture in which the lower courts ruled in this case and the content of their rulings." Opp. 10. Merrell stresses that the *judgment* below ultimately "was issued under Federal Rule of Civil Procedure 56, not Federal Rule of Evidence 703," Opp. 10, and claims

[2] *See* Petition for Certiorari in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, No. 83-2004 (filed June 7, 1984), Question 3. The grant of certiorari was limited to the other two questions. 471 U.S. 1002 (1985).

that the judgment "is simply not premised on Rule 703 at all." Opp. 11. The judgment below is supposedly "a straightforward application of summary judgment procedure," on a finding that Petitioner's evidence "was factually insufficient to persuade a reasonable jury on a key element of [the] case." Opp. 12. Merrell suggests that the Court of Appeals below held only "that a certain quantum of evidence had been found insufficient as a matter of law to raise a 'genuine issue' on causation," and therefore Merrell concludes that "this case concerns only a factual inquiry about Bendectin's use and effects." Opp. 13, 14.

Merrell is wrong. Merrell cannot evade the core Rule 703 holding on admissibility that is the basis of the judgment. This case concerns *only* the pure legal issue of the proper construction of Rule 703, as well as related statutory and constitutional issues. This Court exercises its certiorari jurisdiction to resolve important issues of federal law where they are properly presented, regardless of the factual background of the particular case, and it should do so here.

The Petition amply documented the procedural posture below and the explicit Rule 703 rulings, with no relevant rebuttal from Merrell. The summary opinions below granting summary judgment were based *solely* on the reasoning of *Richardson* and *Ealy*. Pet. 16-17. In turn, the result in *Richardson* and *Ealy* turned *solely* on Rule 703: all of the plaintiffs' expert opinion causation evidence was ruled *inadmissible* under Rule 703 because of the supposedly overwhelming weight of the other side's expert opinion testimony; only *then* was judgment granted under Rule 56, given the lack of any admissible causation evidence. Pet. 12-15.[3]

[3] The fact that the Court of Appeals below *summarily* affirmed the District Court on the basis of *Richardson* and *Ealy* — rather than reiterating the reasoning in those opinions at length — cannot immunize the ruling from review on Merrell's theory that "this Court has already declined to review" those cases. Opp. 15, and therefore it is somehow "too late" for Anne Elisabeth Koller, in

Only selective quotation and misleading characterization permit Merrell to pretend otherwise. Merrell reports that the *Ealy* court "found that the evidence was 'so one-sided that no reasonable juror could find on the admissible evidence that Bendectin caused the plaintiff's birth defects.'" Opp. 8 (quoting *Ealy*, 897 F.2d at 1161). Yet this was merely the *Ealy* court's hornbook snippet reciting the standard of review for judgment n.o.v. determinations, and no serious issue under the *Celotex* trilogy was involved. The only reason that the evidence was "one-sided" and judgment was entered against the Ealys was that they had *no* admissible evidence given the core adverse Rule 703 holding. *Ealy* stressed, in rejecting a strong *Erie* objection, *see* Pet. 12-13 n.6, 15 n.7, that "this case, like *Richardson*, turns on the *admissibility* of the expert testimony" under Rule 703, and that once all of the Ealys' expert opinion testimony "is deemed *inadmissible*, it is self-evident that the evidence is insufficient to support a verdict for the plaintiffs." 897 F.2d at 1163 (emphasis added). Despite Merrell's attempted obfuscation, the only "quantum of evidence" holding under Fed. R. Civ. P. 56 was thus that *the resulting complete lack of any evidence* could not support a finding of causation — a holding irrelevant to this Petition.

---

this Petition, to raise the statutory and constitutional flaws posed by the entering of judgment against *her* for these reasons. If the questions she raises are worthy of review, this Court may of course hear them. Nor is there anything to Merrell's attempt to make something out of its unsupported assertion that this Petition "repeats 'almost verbatim' the same arguments made in" earlier petitions. Opp. 1-2. This Petition in fact frames very different issues than those petitions (as a cursory examination of them reveals), and in any event "[t]he denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." *United States* v. *Carver*, 260 U.S. 482, 490 (1923).

As explained in the Petition, the summary action of the Court of Appeals below militates in favor of a grant of certiorari, because it reveals that the decision rests on a common-law evidence rulemaking technique that is incompatible with the Federal Rules of Evidence, Pet. 26-27, and because it raises grave constitutional issues, Pet. 27-30. Both sets of issues are important in a range of other cases.

Other federal courts discussing *Richardson* and *Ealy* have had no trouble recognizing that this line of cases employs solely Rule 703 to resolve cases by *excluding* all the evidence, rather than making any judgment about the "legal sufficiency" of the evidence offered but *not* admitted.[4] The Questions Presented are properly before this Court.

3. Merrell's irrelevant and unfounded argument that a circuit court consensus exists that no reasonable jury may find that Bendectin causes birth defects.

Merrell recounts at length its view that there is overwhelming evidence that Bendectin does not cause birth defects, and it argues that a "unanimous consensus" exists among the circuits that no reasonable jury could find for any plaintiff on causation. Opp. 3-8. On this basis, Merrell suggests that this case presents only unique and narrow issues about particular kinds of Bendectin evidence, and therefore that a grant of certiorari "would have severely limited application." Opp. 15-16.

First and foremost, this argument is irrelevant and misperceives the function of this Court. The meaning of a central provision governing the admission of expert opinion testimony — Rule 703 — is what drives this case and warrants review

[4] *E.g. DeLuca, supra*, 911 F.2d at 954 (squarely rejecting the construction of Rule 703 in *Richardson*); *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 884 F.2d 167, 168 (5th Cir. 1989) (dissent of Reavley, C.J., and five other judges from denial of rehearing *en banc*), *cert. denied*, 110 S. Ct. 1511 (1990) (noting that unlike the *Richardson* decision, "our panel does not purport to hold that the foundation for the opinions of these experts fails to satisfy Federal Rule of Evidence 703"); *Longmore* v. *Merrell Dow Pharmaceuticals, Inc.*, 737 F. Supp. 1117, 1118, 1120 (D. Idaho 1990) (noting that *Richardson* "held that testimony of the plaintiffs' experts concerning three types of scientific studies was inadmissible under Federal Rule of Evidence 703" and rejecting this view that Rule 703 permits defendants to employ supposedly "overwhelming" statistical data in order "to bulldoze aside the plaintiffs' experts"). Not surprisingly, *Richardson* and *Ealy* are prominently cited in the *General Electric* petition, at 16-18, as key Rule 703 decisions.

by this Court. This is no more a "Bendectin case" than *Hickman* v. *Taylor*, 329 U.S. 495 (1947), was a "tugboat case," *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), a "railroad case," or *I.N.S.* v. *Chadha*, 462 U.S. 919 (1983), an "immigration case."

As the Petition noted, given the general nature of the Questions Presented and their applicability to *all* litigation involving expert testimony, "the specific content of the scientific testimony in this case" is not at issue. Pet. 5. As noted above, this case does not concern issues of the "legal sufficiency" of this evidence, *once admitted*, to support a jury verdict on causation. Petitioner complains that the courts below improperly considered the relative *weight* of competing expert opinions in passing on the Rule 703 issue, and urges adoption of the Third Circuit's *Japanese Electronics* holding that the weight of opinions is irrelevant under Rule 703.

If this Court grants review to settle the *purely legal issue* of the meaning of Rule 703, and related legal issues, there will be no need to review the content of the specific testimony offered on Bendectin. That evidence will come into play, if petitioner prevails, only on remand, when the District Court decides the admissibility of petitioner's expert testimony under the proper Rule 703 standard. Because the types of data relied on by petitioner's experts are routinely relied on by teratologists in rendering opinions — pro or con — on causation issues, Pet. 5-9, presumably the expert testimony will be admitted. And, as noted below, it is quite probable that petitioner's evidence, once admitted, will survive any renewed challenge to legal sufficiency. Certiorari is therefore proper because petitioner has a clear stake in the proper construction of Rule 703, and in the related issues raised by this case.

Merrell urges denial of review on the assertion that "it is highly unlikely that it would even affect the *ultimate judgment* in this very case," speculating that "even if Petitioner's expert

testimony were deemed admissible under rule 703," the District Court on remand will nevertheless find the evidence legally insufficient to sustain a jury verdict under Fed. R. Civ. P. 56. Opp. 17 (emphasis added). But this Court does not concern itself with the ultimate fate of the cases it selects; it grants review of the questions presented by the cases. This case happens to be an ideal vehicle for examination of important, purely legal issues, *whatever* the ultimate judgment, and certiorari should be granted for that reason.

Second, in any event Merrell's "consensus" argument is unfounded. There is in fact every reason to expect that, upon admission of petitioner's expert testimony on remand, petitioner's evidence will be regarded as sufficient to uphold a jury verdict. As Merrell nowhere denies, the District Court below *twice* rejected Merrell's summary judgment argument that no jury issue existed, even after Merrell drew on the *Celotex* trilogy. Pet. 10-11. A trial was averted only because the District Court felt bound by *Richardson* to rule all of petitioner's evidence inadmissible. Pet. 16. Also, as Merrell nowhere denies, a finding of "legal sufficiency" appears mandated given the definitive ruling of the D.C. Court of Appeals that the type of Bendectin evidence proffered by petitioner satisfies the causation standard under the District of Columbia's substantive law — a "legal sufficiency" ruling which both *Richardson* and *Ealy* accorded respect. Pet. 11 n.5, 12-13 n.6, 15 n.7. Finally, Merrell is utterly wrong in claiming that there is a "unanimous consensus" among the circuits that plaintiffs' causation evidence is legally insufficient to support a jury verdict, for only a lone panel in the Fifth Circuit has so ruled.[5]

[5] As Merrell off-handedly recognizes, only in *Brock* v. *Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, *modified*, 884 F.2d 166, *reh'g denied en banc*, 884 F.2d 167 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990), has an appellate panel "specifically concluded" in favor of Merrell's insufficiency argument. Opp. 8. The extraordinary, legislative-sounding reasoning of that opinion, *see* Pet. 29-30, was vigorously challenged by Judge Patrick E.

Merrell's exclusive reliance, throughout its Opposition, on such irrelevant and unfounded arguments amounts to an admission that certiorari should be granted in this case to resolve important and recurring legal issues involving the Federal Rules of Evidence.

CONCLUSION

For the reasons stated in the Petition and above, a writ of certiorari should be granted.

Respectfully submitted,

KENNETH J. CHESEBRO
1600 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 661-4423

March 14, 1991

Higginbotham and five other judges in dissent from denial of rehearing *en banc*, and has not been adopted by any other circuit.

Merrell is wrong in intimating that the opinions of the District Court and the Sixth Circuit in the multidistrict consolidated trial lend support to the legal insufficiency thesis. Opp. 5. In fact both courts went out of their way to note that the jury might just as easily have ruled against Merrell. Pet. 10 n.4. Merrell also errs in suggesting that the First Circuit's decision in *Lynch* v. *Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir. 1987), or the D.C. Circuit's decisions in *Richardson* and *Ealy*, support its claim of legal insufficiency. Opp. 6-7. These decisions rely solely on ruling all the evidence *inadmissible* under Rule 703, not on any review of the legal sufficiency of evidence once admitted. Pet. 11-15.

Not surprisingly given the above, federal trial judges routinely refuse to grant summary judgment in Bendectin cases. Cases just last year include *Longmore*, *supra* note 4; *In re Bendectin Products Litigation*, 732 F. Supp. 744, 749 (E.D. Mich. 1990) (decision of Judge Rubin, who presided over the multidistrict litigation cited in Opp. 5, concluding that "the Court is convinced that there are genuine issues of fact which preclude entry of summary judgment"); and *Wilson* v. *Merrell Dow Pharmaceuticals, Inc.*, No. 83-C-710-E, slip op. at 1 (N.D. Okla. March 1, 1990) (finding that "[s]ubstantial scientific evidence exists to support both the conflicting arguments regarding causation").